Filed 12/5/16 Hendrickson v. Rizzo CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JENNIFER HENDRICKSON, Plaintiff and Respondent, v. MICHAEL RIZZO, JR., Defendant and Appellant.	B264336 (Los Angeles County Super. Ct. No. BD532436)

APPEAL from a judgment of the Superior Court of Los Angeles County, Armen Tamzarian, Judge. Affirmed.

Michael Rizzo, Jr., in pro. per., for Defendant and Appellant.

Jennifer Hendrickson, in pro. per., for Plaintiff and Respondent.

Appellant Michael Rizzo and respondent Jennifer Hendrickson (aka Jennifer Rizzo) married in October 1998 and divorced in December 2012. They have one son, James, who was born in October 2003, and over whom they exercise joint custody. They share the right to make educational decisions for James, and under the judgment of divorce were to meet and confer regarding his middle school placement. In the 2013-2014 school year, when James was in the fifth grade, the parents disagreed over whether James should be enrolled for sixth grade at Luther Burbank Middle School in the Burbank Unified School District (respondent's preference) or at one of two schools – Millikan Math Academy or Larchmont Charter School – in the Los Angeles Unified School District (appellant's preference).

The result of the disagreement has been lengthy and bitter litigation of which this appeal is a part. On April 23, 2014, the trial court ruled that it was in James' best interests to be enrolled at Luther Burbank in the sixth grade. Appellant then sought reconsideration of that ruling several times, including in the February 18, 2015 Request For Order that is the subject of this appeal. In that request, appellant alleged that James was being bullied at Luther Burbank and should be transferred to Larchmont. Following an evidentiary hearing, the court denied the request on May 13, 2015, finding no credible evidence of bullying. Representing himself, appellant appeals from that order, contending, in substance, that the trial court abused its discretion in refusing to reverse its April 23, 2014 order. We disagree, and affirm.

BACKGROUND

I. *Prelude to Appellant's February 18, 2015 Request for Order (RFO)*

In the winter of the 2013-2014 school year, appellant and responded disagreed about where James, who was then in the fifth grade, should attend middle school the next year. Mother wanted him to attend Luther Burbank Middle School in the Burbank Unified School District, the same district as his elementary school. Appellant wanted him to attend a school outside of that district, first Millikan Math Academy, and later Larchmont Charter School, both in the Los Angeles Unified School District. According to appellant, James would be better off academically at these other schools. From February 11 through March 24, 2014, appellant filed four RFO's related to this dispute. By stipulation of the parties, the court agreed to resolve the disagreement, and on April 23, 2014, ruled that it was in James' best interest to be enrolled in Luther Burbank for the sixth grade.

Appellant filed two "motions for renewal" seeking to allow James to attend Larchmont. On August 11, 2014, the court held an evidentiary hearing, and denied appellant's requests.

On November 10, 2014, at a hearing on matters concerning child custody and visitation, appellant reiterated that he did not want James attending Luther Burbank. The court did not reconsider the issue, and ordered appellant and respondent not to discuss the issue of school choice with James and not to make derogatory remarks about each other in James' presence.

II. *February 18, 2015 RFO*

Appellant's February 18, 2015 RFO – the RFO at issue in this appeal – again sought to have James attend Larchmont. Appellant alleged that James was at immediate risk of harm at Luther Burbank based on several incidents that qualified as "bullying" as defined in Education Code section 48900, subdivision (r)(1). The parties submitted voluminous documents to the court. As here relevant, they showed the following.

A. *Initial Bullying Allegations*

Appellant initially reported three incidents of bullying to the Burbank District, which investigated them. On November 12, 2014, at appellant's request, the assistant superintendent for instructional services provided a written response, finding no evidence of bullying. We quote from the letter:

1. "*PE Incident (9/17/2014)*"

"Two other sixth grade students were playing a game that involved heating pistachio shells under their shoes and then putting those heated shells on people's arms. James received a blister on his arm from one of those students doing this to him with a pistachio shell. James reported that this occurred to the nurse. [¶] After treating the blister, the nurse referred James to the assistant principal, who then met with [appellant] and James. According to James, he knew these students and considered them to be friends, and that they were playing around. [¶] . . . [Appellant's] concern about this was discussed at a recent IEP [Individualized Educational Program] team meeting. James participated in that meeting and reaffirmed that he and his friends were playing with pistachio nuts and placing them on each other. James validated that there was no bullying involved in the

incident. Since that event on 9/17/14, there have been no similar incidents and nothing related to bullying."

2. "*Incident in class (week of 10/23/14)*"

"James stated that another student pushed him while he was seating in English class. The teacher overheard a commotion from the areas where the boys were seated, and issued a consequence for the other student who had pushed James. There were no witnesses to the event. According to the other student, this was a mutual situation in which both boys were fooling around with each other. In the statement written by the teacher, she noted that later in class, both boys were observed talking and interacting with each other in a way that appeared as if they were having fun together. Both boys were told to mark their behavior charts, as this interaction was disruptive to the class."

3. "*Tripping Incident (10/29/14)*"

"According to James, he was walking in a crowd of students during lunch and was tripped. In his statement, James wrote, 'I got tripped and people started to [snicker].' James stated that he then went to go play basketball with his friends. James did not know who may have tripped him and no witnesses were identified. It is unclear as to whether or not James was tripped intentionally. This event was not reported to school staff by James or any other students. Staff members found out about it after you contacted the district to report it. James was then asked to write a statement about the event. He could not identify any student(s) who may have tripped him."

"Based on our investigation, the incidents do not appear to be bullying, but rather James may not be reporting occurrences accurately, or perhaps he is misunderstanding social cues. Please be informed that James' IEP team will address these concerns and invite James to the next IEP team meeting scheduled for November 13, 2014."

B. *IEP Meeting*

The IEP meeting was held on November 13, 2014. Both parents and James attended. Appellant expressed concern about bullying. Respondent stated that regardless of the alleged bullying, James was excited about going to school and said that he had a lot of friends. James said that the "pistachio" incident was bullying, and that he did not feel safe at school.

C. *December 20, 2014 E-Mail*

By email to the District dated December 20, 2014, appellant wrote that James reported two additional incidents of bullying. In the first incident, James told appellant that one of his friends kicked another friend in the genitals, dropping him to the ground. According to appellant, James was very upset at witnessing the incident.[1] In the second incident, James told

---

[1] Apparently, the father of the boy, E., who was kicked, was an acquaintance of respondent. With regard to the kicking incident, appellant emailed the father, telling him what James said he had witnessed and informing him that appellant might subpoena both E. and the boy who kicked E. to testify at the hearing on his February 18, 2015 RFO, unless respondent agreed to allow James to attend Larchmont. E.'s father responded that "James is a great kid. I really like him. But as you hopefully also know, James sometimes exaggerates and/or makes stuff up." As described by E., the incident simply involved the boys playing basketball and E. getting kicked in the thigh. E.'s father had told E. to stay away from the other boy. According to E.'s father, E. had not witnessed or taken part in any bullying.

appellant that he had seen three older boys knock several younger students to the ground. James felt frightened because he felt he should stop the bullying, but was afraid he might get hurt. Further, James reported to appellant that Luther Burbank had "a pervasive culture of casual profanity and casual violence among its students."

D. *The District's January 5, 2015 Letter*

On January 5, 2015, the District's counsel responded by letter to a request by appellant that the District change James' placement to Larchmont, and that the District file a declaration with the court requesting the court to reverse its prior decision placing James at Luther Burbank. Among other things, the letter reiterated the results of the District's prior investigations (it noted that James had not reported the incidents described in appellant's December 20, 2014 email) and concluded: "It appears that [appellant] is attempting to create a false environment of bullying at Luther Burbank . . . to further an agenda to change James' school placement. The District takes bullying allegations very seriously and maintains policies and procedures identifying bullying when it occurs, and addressing such inappropriate conduct. [Appellant's] allegations of bullying are unfounded and unsupported."

He also explained that appellant's email was inappropriate: "This is between you and your ex-wife and has NOTHING to do with us. Let me be clear, this is going to be the last contact you ever make with us. . . . I wish you [and respondent] the best, but this needs to be the last we hear of this and from you." Nonetheless, appellant responded in a lengthy email, asking E.'s father to speak to respondent about allowing James to attend Larchmont and raising the specter of a "candlelight vigil" for James if he remained at Luther Burbank. E.s' father responded that appellant was "out of [his] mind," and threatened to contact the police if appellant's harassment continued.

E. *January 5, 2015 Restraining Order*

As part of his effort to resist the court's order that James attend Luther Burbank, appellant engaged in a pattern of harassment of respondent, seeking to pressure her to allow James to attend Larchmont. To prohibit that harassment, respondent sought a restraining order against appellant, which the trial court granted for a period of one year on January 5, 2015.

F. *Additional Reports of Bullying*

On February 10 and 11, 2015, appellant reported additional alleged incidents of bullying. Apparently on those dates, a few 6th and 7th graders threw food at each other after a 7th grader used profanity and teased the 6th graders. James signed a formal declaration with the Burbank District describing the incident. By letter dated February 25, 2015, the District's counsel responded to appellant's complaint: "The students involved, including James, were interviewed, and reported that profanity was used and food was thrown by both 6th and 7th graders involved. There was no report of any physical altercation. . . . [O]n . . . February 11, 2015, a campus supervisor did observe the behavior and advised the 7th graders to leave the area. Since then, there have been no further incidents between these groups of students and the 6th graders, including James, have been instructed to contact staff."

G. *James' Written Statement Filed with the Court*

Included as an exhibit in appellant's filings with the court was a handwritten statement by James in which he said that "Luther Burbank middle school is only good because of band and science. On the other hand I

see kids getting picked or I have been picked on to[o]. In the first 3 weeks of school, I got burned with a [pistachio] nut that left me a scar. The next one is being pushed down by a group of kids. The next incident is I got tripped by some 8th graders that were rolling to peoples' legs and tripping them. After that I got pushed to a locker by an 8th grader. The next incident is some kids. They were being jerks and they found a . . . pizza that was bitten and on the floor. They [poured] orange [juice] on my friend's head. We ignored them and they kept on bothering us. I got pushed by them. . . . We went 7 courts away from them but they followed us. They stopped only because the bell rang. The next day they picked on us with carrots."

James added: "I feel unsafe at Luther. In the examples that I said it is not me getting picked on is actually bullying. This is bullying because those events keep happening over and over. My feelings are going to be happy if I get out of this school, but right now I am sad/happy. [Another] example is that I got pushed out of my chair in Miss Thalhimer's class. In my IEP meeting they said 'me and [the other boy] were just playing around' and then I said 'That's not what happened.'"

He ended the letter with a plea: "YOUR HONOR PLEASE GET ME OUT OF LUTHER!!!!!!!!!!"

III. *Evidentiary Hearing*

On May 12, 2015, the court held an evidentiary hearing on appellant's RFO. Appellant represented himself, while respondent was represented by counsel.

Two witnesses testified. One of the witnesses was Brian O'Rourke, the former principal at Luther Burbank (now the Director of Student Services in the Burbank District). According to O'Rourke, most of the complaints of

bullying were made by appellant, not James. After the incidents were investigated, it was determined that no bullying had occurred. At worst, the incidents involved behavior that is "extremely common" among sixth-grade boys, "not appropriate, but we call it housebreaking, to get them over it."

The other witness was Anne Lintott, a Family Court Services Specialist whom the court had appointed to interview James (then 11 years old and in the 6th grade). She testified at length concerning the interview.

According to Lintott, when asked how school was going, James said, "good," but added that he was being bullied. Asked what he meant by bullying, he stated, "Hard to say. Pain over and over and again," and gave as an example the incident in which a boy named L. rubbed a pistachio nut hard on the ground, and burned James and his friend K. with it. L. had learned the trick at a birthday party and was showing the other boys. Then K. performed the same trick on someone else. James said that L. used to be his friend (apparently at the time of the incident), but not anymore, and that now James was a "little bit" afraid of him, though there had been no other incident between them.

As another example, James referred to the incident in which a classmate C. pushed him off his seat in class. James did not know why C. did so, denied that C. was a friend, but added that he was not afraid of C.

As another example, James stated: "Some eighth graders were outside rolling basketballs at kids, trying to trip them, then they rolled it at me. . . . I went to the nurse. I got hurt. I lost balance and fell. I couldn't move. I lost all connection to my brain." There had been no other incidents with these boys.

As still another example, James said "When I was in a crowd of people, and I was looking for my friends, and I fell in front of everyone. . . . I think someone tripped me. Everyone started laughing. I was embarrassed."

James said that he had been to the principal's office "[l]ike 14 times" to report bullying incidents, but "they will do nothing about it." James explained that he told appellant, who "tried to fight for a better school, and my mom is lying to the court yet again. . . . Before the restraining order and all the serious stuff, my dad has been telling me that my mom has been lying about different bullying incidents. I read the court documents. She lied about the second degree burn. And it's still on my arm."

James said that he read the court documents at appellant's house because respondent would not let him see them. James had read them to see if appellant was telling the truth. He explained: "Sometimes I'm not sure, but most of the time he is telling the truth." James knew that appellant was "fighting hard" to get James admitted to Larchmont, the school appellant suggested and which they toured together, and where James now wanted to go, even though he had no friends there.

When asked if respondent wanted him to stay at Luther Burbank, James replied, "Yes. All my friends are here. It's close to where she lives. She thinks my dad lives closer to Larchmont, but actually my mom does. My dad offered to pay her $10,000 per year without taxes. That's $70,000 if I make it all the way through 12th grade. My dad has offered to commute me there every day. And my mom said no." James said that he felt "horrible. I want to learn how to read. I have a reading comprehension problem. Larchmont School knows how to fix my problem. . . . Luther doesn't want to spend the money for an aide. They want me to fail. Luther cheated me of my

test scores. . . . The school district promised 45 minutes a day of reading help, but they think basic English is the same thing."

James said that respondent "[d]oesn't want to tell the truth, that's why she has the meanest lawyer she could find. . . . All the judges are afraid of him. Also my mom way overpays him. . . . $6 per minute which is $360 an hour [according to appellant]. . . . My dad showed me online that he's been in jail two times. He used to be a police officer, but he sold drugs to kids."

James added: "Now he [appellant] can't talk to me about anything, [because he] . . . [w]as told by the judge that he can't. On the other hand, someone has been telling me. Robert, my dad's friend, he used to be a teacher. I asked him what's going on in court, and he tells me the little details. The court never told Robert he couldn't talk to me . . . [a]t my dad's house, but my dad is in the other room."

James accused respondent of not caring that he was being bullied, and of being on the school district's side, because "[a]t the I.E.P., she agreed with them for only 2 minutes per day for my reading help. She just wants me to stay in the school no matter what." James noted that appellant was at the meeting and "wanted to stop all the bullying, but the school did nothing about it."

When asked about his parents' interaction with each other, James said that "They don't like to communicate with one another. . . . They don't like each other." He said that custody sharing was "okay. It's not perfect. . . . I'm with him 50/50, but I just want them to be together. . . . I can't see them every day."

He also said: "My mom and I used to have an amazing connection, but then the connection got lost because of all this court stuff. I was closer to her than my dad. Then our connection just broke."

Regarding his history at Luther Burbank, James stated that his fist semester was "okay," but the second and third were "bad because of bullying. . . . Dad had bad feeling about it, about Luther, he still wasn't okay with it." Currently, James felt "fine. . . . Band keeps me going. There's been no recent incidents." Asked what he wanted to tell the judge, he said, "Get me out of Luther and read the documents that I wrote."

IV. *The Court's Ruling*

After taking the matter under submission, the court filed a written decision. As relevant to this appeal regarding the alleged bullying, the court found that appellant had repeatedly violated the court's order of November 10, 2014, that he not discuss the school choice issue with James and not make derogatory remarks about respondent in James presence. Besides talking in detail to James about the issue, he also had allowed his friend Robert to talk to James about it. The court concluded that appellant had "manipulated" James into believing that he had been bullied and pressured him to claim he was being bullied. Appellant's conduct had caused substantial harm to James, and there was "no credible evidence" of a pattern of bullying. At worst, James had been subject to a few isolated incidents. The court also found no credible evidence that James had suffered any significant physical or psychological harm. Thus, the court denied appellant's request that James be transferred to Larchmont, concluding it was not in his best interests to transfer.

DISCUSSION

Construed in the light most favorable to appellant, his opening brief argues, in substance, that the trial court abused its discretion in refusing to

reverse its previous order directing that James remain at Luther Burbank. We disagree.[2]

The dispute over where James will attend school is within the realm of the parents' joint custody agreement. "In deciding between competing parental claims to custody, the court must make an award 'according to the best interests of the child' [former Civ. Code, § 4600, subd. (b), now encompassed by Fam. Code, § 3020, subd. (a)].[3] This test, established by statute, governs all custody proceedings. [Citation.] The changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of

---

[2] We recognize that appellant is representing himself on appeal. Nonetheless, his opening Brief raises a host of arguments that find no support in the law or record before us, or that are irrelevant to the limited, legitimate issue raised by this appeal. Therefore, we deem those arguments forfeited and focus on the question whether the trial court abused its discretion. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["'We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.'"].)

[3] Family Code section 3020, subdivision (a) provides in relevant part: "(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children."

judicial economy and protecting stable custody arrangements. [Citations.]" (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549.)

In the present case, after a contested hearing, the court ruled on April 23, 2014, that it was in James' best interest to be enrolled in Luther Burbank for the sixth grade. Appellant's February 18, 2015 RFO challenged that ruling, and thus it was appellant's burden to demonstrate a significant change in circumstances that would make James' attendance at Larchmont rather than Luther Burbank in James' best interest. Appellant sought to meet that burden by showing that James was being bullied at Luther Burbank. He relied on the definition of bullying in Education Code section 48900, which lists the acts for which a pupil can be recommended for suspension or expulsion from school, including in subdivision (r) that the pupil "[e]ngaged in an act of bullying." Subdivision (r)(1) defines "bullying" as "any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

"(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

"(B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.

"(C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.

"(D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school."

The trial court concluded that appellant had not shown that a change in James' enrollment to Larchmont was in James' best interest because there was no credible evidence of bullying. We find no abuse of discretion. Indeed, the evidence overwhelmingly supports the court's ruling. We have set forth the relevant evidence at length above, and need not repeat it here. We make only the following points.

First, taken at face value and considered as a whole, the incidents described by appellant and James fall short of the definition of bullying under Education Code section 48900, subdivision (r), which requires "severe or pervasive physical or verbal act[s] or conduct" that would cause a "reasonable pupil" to fear harm or "to experience a substantially detrimental effect on his or her physical or mental health," "substantial interference with his or her academic performance," or "substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school." (*Id.,* subds. (r)(1)(A)-(D).) Here, the incidents on which appellant relies were, at worst, isolated events of inappropriate behavior by James' classmates typical of adolescent boys. They would not cause a "reasonable pupil" to experience any of the negative consequences described in subdivision (r).

Second, to the extent James believed he was being bullied and expressed fear and a desire to leave Luther Burbank for Larchmont, his feelings were not those of the "reasonable pupil" contemplated by the statute, but rather those of a pupil who had been bent to appellant's will by repeated indoctrination. As the trial court found and the evidence amply supports,

despite the court's November 10, 2014 order that appellant not discuss the issue of school choice with James or make derogatory remarks about respondent in James' presence, appellant repeatedly violated that order, as demonstrated by many of James' statements to Anne Lintott.

Third, as the trial court also found, there was no credible evidence that James suffered any significant psychological or physical harm from attending Luther Burbank, nor was there evidence that James' reading at less than grade-level was the result of events at Luther Burbank or failures by that school that would be rectified at Larchmont.

In short, appellant failed to meet his burden of showing that a significant change in circumstance existed such that James' attendance at Larchmont was in James' best interests.

DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.[4]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.

---

[4] Respondent's motion for sanctions is denied.